Supreme Court, U.S.
FILED
FEB 13 2015
OFFICE OF THE CLERK

No. 14-144

In the Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL., PETITIONERS,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL., RESPONDENTS,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR CHILDREN FIRST FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

JONATHAN D. CHRISTMAN
Counsel of Record
Fox Rothschild LLP
10 Sentry Parkway
Ste. 200, P.O. Box 3001
Blue Bell, PA 19422
(610) 397-6500
JChristman@foxrothschild.com

RANDALL L. WENGER
Independence Law Center
23 N. Front Street
Second Floor
Harrisburg, PA 17101
(717) 657-4990

Counsel for Amicus Curiae Children First Foundation, Inc.

QUESTIONS PRESENTED

1. Do the messages and symbols on state-issued specialty license plates qualify as government speech immune from any requirement of viewpoint neutrality?

2. Has Texas engaged in "viewpoint discrimination" by rejecting the license-plate design proposed by the Sons of Confederate Veterans, when Texas has not issued any license plate that portrays the confederacy or the confederate battle flag in a negative or critical light?

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INTEREST OF *AMICUS*[1]

Amicus is Children First Foundation, Inc. ("CFF"), a New York nonprofit corporation that promotes adoption as a positive choice for women facing unwanted pregnancies or newborn babies in New York, New Jersey, and Connecticut. CFF raises funds to support healthcare facilities that serve these pregnant women. CFF was founded after Elizabeth and Charles Rex adopted two children born to young women with unplanned pregnancies who chose life and adoption for the children they birthed. *Amicus* submits this brief in support of Respondents, Texas Division, Sons of Confederate Veterans, Inc., *et al.*

CFF is interested in this case because vital free speech principles are at stake and it is currently party to a case pending before the United States Court of Appeals for the Second Circuit, *see Children First Found., Inc. v. Fiala*, No. 11-5199 (2d Cir.), which will likely be impacted greatly by the outcome of this litigation.

Similar to Texas, New York opened up a forum in which individuals and nonprofit organizations were invited to create specialty license plates

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[1] The parties granted mutual consent to the filing of *amicus curiae* briefs in support of either or neither party pursuant to S. Ct. R. 37.3(a). Documentation reflecting the parties' mutual consent agreement has been filed with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

bearing customized messages in favor of their own cause. Begun in 1992, New York's custom plate program was initiated and advertised with the slogan "Take Your Pride for a Ride." To procure a custom plate, an applicant was required to be (1) a nonprofit corporation registered in New York; (2) have a sponsoring agency or organization as the main point of contact; and (3) pay a $5000 deposit that is refunded if two hundred plates are sold within a three-year period. *See Children First Found., Inc. v. Martinez*, 829 F. Supp. 2d 47, 52 (N.D.N.Y. 2011). Upon obtaining a "custom plate development kit," the applicant submits a group information form and the designed artwork that fits within the space dimensions and template for a license plate (a smaller portion of space on the left side of the plate for a "logo" and a larger segment of space along the bottom of the plate for a "tagline"), and other "administrative" details. *Id.* Individuals and organizations looking to acquire a plate bearing a customized logo and message must pay an additional fee beyond the price of a standard-issue plate. *See* N.Y. Veh. & Traf. Law § 404(1).

Under this system, approximately 260 different specialty plates from eight wide-ranging categories (I Love NY Adventure, Sports, Military and Veterans, Counties and Regions of New York, Colleges, Fraternities, and Sororities, Causes, Professions, and Organizations) have access to the speech forum. These specialty license plates support an eclectic variety of educational, artistic, social, environmental, and healthcare-related causes, and are sponsored by a wide variety of

recreational, occupational, associational, political, social, and religious organizations.

But when CFF submitted a custom plate design bearing its logo, a simulated crayon drawing of two children's smiling faces in front of a yellow sun, and its tagline, "Choose Life," their organizational plate application was denied. Government officials concluded—in their "discretion"—that "a significant segment of the population" would find CFF's speech to be "patently offensive" and CFF needed to steer clear of "controversial issues." *CFF*, 829 F. Supp. 2d at 52-53. Officials further surmised that CFF had an "inten[t] to draw attention to...the abortion debate," and, without any evidence, declared that public hostility to CFF's speech was so "emotionally charged" that it would "engender violent discourse among drivers," elicit "road rage and aggressive driving." *Id.*

Yet in more than half of the States in the Nation (including Texas), the same or similar plate is available to motorists with no apparent adverse effects.[2] Thus, the denial of CFF's custom plate in New York evidences textbook viewpoint

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[2] Custom plates bearing the phrase "Choose Life" and essentially the same logo are available for purchase in twenty-nine states and the District of Columbia. *See* http://www.choose-life.org/other-states.php (showing images of "Choose Life" license plates available in Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and Virginia) (last accessed Feb. 13. 2015).

discrimination and unbridled discretion similar to what the Respondents experienced in Texas. Therefore, although CFF may not agree with what the Respondents say (or what their speech may symbolize to others) CFF will nonetheless defend their right to say it within the speech forum Texas created. The First Amendment, after all, rests on the "principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

SUMMARY OF ARGUMENT

This case is about whether government may silence viewpoints it finds distasteful, offensive, and controversial from a license plate forum opened for a panoply of private speech and expression. Apparently, everything is bigger in Texas, except for Petitioners' view of the First Amendment. But Constitutional protections do not shrink just because a speech forum may be physically small, *i.e.*, a 6 inch by 12 inch piece of metal rather than a public park or other public forum.

License plates affixed to privately-owned vehicles and bearing customized messages or symbols designed by private organizations and voluntarily selected by an individual for an extra fee communicate private speech readily associated with the sponsoring organization and the vehicle operator. Texas, having purposefully created a forum for such private expression on license plates, may not neuter the Free Speech Clause by decreeing that messages chosen and crafted by

private organizations and individuals for their own vehicles constitutes government speech not subject to First Amendment scrutiny. This would overturn long-standing precedents of this Court and render the Free Speech Clause functionally impotent in government-created speech fora, permitting the unfettered and unbridled discretion of government officials to stamp out ideas they find offensive and silence speech they subjectively dislike. But speech is protected by the First Amendment precisely because some might find it troubling or offensive.

ARGUMENT

I. The Respondents' proposed license plate bearing the Confederate flag is private speech entitled to the full protection of the First Amendment.

Customized license plate logos and messages of the sort at issue in this case represent private speech subject to the full protection of the First Amendment. This Court's own precedent establishes this principle. It does not need a tune-up, let alone a recall, particularly as it has functioned well for decades.

A. Specialty license plates bearing customized messages and symbols communicate speech by the sponsoring organization and the vehicle operator.

Thirty-eight years ago, in the only decision of this Court directly addressing license plates and the First Amendment, this Court recognized that engraved messages on standardized, state-issued

license plates implicated the driver's free speech rights. *See Wooley v. Maynard*, 430 U.S. 705 (1977). By legislative enactment, New Hampshire required registered passenger vehicles to bear license plates displaying the state motto, "Live Free or Die." *Wooley*, 430 U.S. at 707. A religious minority couple objected to this slogan and challenged the constitutionality of the statute which effectively required them to "use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty." *Id.* at 713, 715.

In *Wooley*, this Court held that the State could not force individuals to disseminate government messages on their license plates, even if display of the state motto "facilitates the identification of passenger vehicles," promotes "appreciation of history, individualism, and state pride," and "most individuals agree with the thrust of New Hampshire's motto." *Id.* at 715-16. This Court emphasized that the First Amendment protects an individual's rights to "speak freely," to "refrain from speaking at all," to "hold a point of view different from the majority" and to "refuse to foster ... an idea they find morally objectionable." *Id.* at 714-15. Because the automobile is "readily associated with its operator" and driving a vehicle is both a "virtual necessity for most Americans" and a part of "daily life" constantly "in public view," the First Amendment protects an individual from becoming an "instrument" or "courier" for what he or she deems an "unacceptable" message. *Id.* at 715, 717, n. 15.

Since *Wooley*, the private expression associated with vehicle license plates has expanded

significantly. All 50 States and the District of Columbia now allow drivers, for an additional fee, to obtain specialty license plates bearing customized messages and symbols rather than the standard-issue, single option plates involved in *Wooley*. For example, a Texas driver may currently choose from more than 370 specialty license plate options (including a "Choose Life" plate).[3] In comparison, New York drivers may choose from approximately 260 options (but no "Choose Life" plate, yet).[4] Such a proliferation of custom license plates confirms what this Court recognized in *Wooley*: a vehicle is a "mobile billboard" in public view that is "readily associated with its operator." Many of these new license plates are specifically designed, funded, and marketed to drivers by a sponsoring organization.

In light of such widespread expansion of custom license plates across the country and the close involvement of private organizations in their creation and design, it is not surprising that five

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[3] *See* http://txdmv.gov/motorists/license-plates/specialty-license-plates (last accessed Feb. 13, 2015).

[4] *See* http://dmv.ny.gov/nav/custom-plates (last accessed Feb. 13, 2015). The United States District Court for the Northern District of New York held that New York's denial of CFF's "Choose Life" plate was unconstitutional on multiple grounds, including impermissible viewpoint discrimination. The District Court also stated that the denial was unreasonable based upon the purpose of the custom plate forum, and that the denial was the result of unbridled discretion. The District Court granted summary judgment on CFF's free speech claims but stayed execution of the judgment pending the filing of a timely appeal, which New York filed. *See CFF*, 829 F. Supp. 2d at 54-67.

Circuits have held that license plates bearing customized messages constitute private speech subject to free speech protections rather than government speech outside the purview of the First Amendment. *See Tex. Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 394-96 (5th Cir. 2014) ("[S]pecialty license plates are private speech."); *Roach v. Stouffer*, 560 F.3d 860, 867-68 (8th Cir. 2009) (customized plates are private speech); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) ("Messages on specialty license plates cannot be characterized as the government's speech."); *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008) ("Choose Life" plate with logo depicting faces of two young children was private speech); *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002) ("SCV's special plates constitute private speech.").[5]

What is surprising, however, are the confusing turns the courts of appeal made to arrive at this destination. The Fifth, Seventh and Eighth Circuits applied a "reasonable observer" test to determine whether a reasonable person observing the circumstances would consider the speaker to be the government or a private party. *Vandergriff*, 759

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[5] The sole outlier among the Circuit courts is the Sixth Circuit's decision in *ACLU of Tennessee v. Bredesen*, 441 F.3d 370, 376 (6th Cir. 2006) ("Choose Life" specialty plate found to be government speech). But, for reasons discussed further in Section I.C, *infra*, the *Bredesen* case presents a readily distinguishable set of facts—namely, a specific legislative statute authorizing and creating a state-sponsored "Choose Life" license plate.

F.3d at 394-95; *White*, 547 F.3d at 863-64; *Roach*, 560 F.3d at 867-68. On the other hand, the Fourth and Ninth Circuits considered a four-factor test evaluating the "central purpose" of the license plate program, the "degree of editorial control" over the license plate message, the "identity of the literal speaker," and whether the government or a private entity "bears the ultimate responsibility for the content of the speech," to determine whether the speech on license plates was that of the government, a private party, or both. *SCV*, 288 F.3d at 618 (internal quotations omitted); *Stanton*, 515 F.3d at 965.

These varying tests needlessly complicate and overshadow a simple point that this Court made long ago: license plates bearing messages on privately-owned vehicles implicate the private expression, or speech, of the driver. *See Wooley*, 430 U.S. at 713-15. Custom license plates created, designed, funded, and marketed by private organizations clearly do. Thus, although *Wooley* does not control this entire dispute (Texas is not attempting to compel Respondents to display an anti-Confederate flag message on their bumpers), it certainly drives home the conclusion that messages on vehicles constitute the private speech of the vehicle operator and, in this specialty plate context, the plate's sponsoring organization as well. Because private speech is implicated, so too is the First Amendment.[6]

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[6] In a confounding and irreconcilable twist, Petitioners claim that *Wooley*, a case about individuals' First Amendment rights, protects Texas from being "forced" to allow an

B. Texas may not use the government speech doctrine to shut down private speech.

To circumvent *Wooley* and evade First Amendment scrutiny, Texas (along with other States like New York) seeks to brand all specialty license plates, regardless of their origin and attribution, as government speech. Pet. Br. at 2. Its reason for doing so is unmistakable: the Free Speech Clause "restricts government regulation of private speech" but "does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). However, "[v]ital First Amendment speech principles are at stake here." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

The government speech doctrine exists to protect a government entity's right "to speak for itself...to say what it wishes, and to select the views that it wants to express." *Summum*, 555 U.S. at 467-68 (alternation in original) (citations and internal quotation marks omitted). The doctrine permits the government to "function" so that it can freely speak its chosen messages and advocate in favor of its preferred value judgments, without itself being compelled to sponsor a different view or "heckler's veto." *Id.* at 468.

But the government speech doctrine is not a sword to shut down disfavored, private speech. *See*

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individual's message on a custom license plate. Pet. Br. at 11, 12. But the Free Speech Clause is not a defense available to government, and no individual required Texas to open a specialty plate forum for private expression.

id. at 473 (acknowledging "legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint"). This would turn the Free Speech Clause on its head. Yet, that is precisely what Texas is attempting to do. *But see Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (citation and internal quotations omitted).

For the government speech doctrine to be applicable, the government must be speaking on its own, on its own property, and "for the purpose" of conveying its own "permanent" and particular message chosen through a "selectiv[e]" process involving delineated content-based factors. *Summum*, 555 U.S. at 471-73. If the government is not the literal speaker and the speech does not occur on government land, the government must nonetheless be the one driving the "overarching" message "from beginning to end" with absolute and active editorial control "over every word" of the purposeful message being conveyed. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-61 (2005). Neither situation describes the specialty license plate forum at issue in this case.

In *Summum*, this Court held that 15 permanent monuments displayed in a 2.5 acre public park represented government speech immune from a First Amendment forum analysis. *See* 555 U.S. at 464, 470. The government speech doctrine permitted the city to deny a minority religious

organization's request to erect its own monument in the park similar to the size of the existing Ten Commandments monument. *See id.* at 464-65. The monuments represented government speech because they were (i) "permanent"; (ii) displayed "on government land"—specifically, a public park closely identified with the government unit that "owns the land"; (iii) chosen through a "selective[e]" process that considered multiple "content-based factors" such as "esthetics, history, and local culture"; and (iv) intended "for the purpose" of "conveying" a government "message" to "all who frequent the Park." *Id.* at 470-74.

Likewise distinguishable, the government speech exempt from First Amendment review in *Johanns* was a purposeful federal government campaign to market and promote beef products. *See* 544 U.S. at 560. Two associations whose members were compelled to pay government subsidies on beef sales that were used, among other things, to fund these government-controlled messages, objected to the assessment on First Amendment grounds because they disagreed with the campaign's message. *Id.* at 553-57. But the beef campaign constituted the government's own speech since the "message of the promotional campaign is effectively controlled by the Federal Government itself." *Id.* at 560. By statute and regulation, Congress and the Secretary of Agriculture specified "what the promotional campaigns shall contain...and what they shall not," and "set out the overarching message and some of its elements." *Id.* at 561 (internal citation omitted). Moreover, government officials attended and participated in

meetings at which proposals were developed and "all proposed promotional messages" were reviewed by government officials "for substance and for wording." *Id.* Some proposals were rejected or "rewritten" by the Department of Agriculture, and the Secretary exercised final editorial authority "over every word." *Id.* In short, the government crafted the message "from beginning to end," exempting the speech "from First Amendment scrutiny." *Id.* at 553, 560.[7]

The same indicia of government speech in *Summum* and *Johanns* are not present here. First, the speech is contained on license plates located on privately-owned vehicles. This location is far different than the public park and exclusively government-owned land in *Summum*. Even if Texas asserts technical ownership over the plate itself, Pet. Br. at 20, this is not dispositive because this Court already held that vehicles are "readily associated" with their operators. *Wooley*, 430 U.S. at 717, n. 15.

Second, custom license plates are not "permanent" and are not constrained by finite physical limitations. *Summum*, 555 U.S. at 464, 478-80. Not only may an individual driver choose a

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[7] Government-controlled messaging is also permissible where the government places limits on private organizations' use of public funds. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 197-98 (1991) (barring medical providers receiving Title X funds from providing counsel and advice regarding abortion services). *Rust* has no applicability in this case, where the money for the custom plates is derived entirely from private individuals and sponsoring organizations, not the state treasury.

different plate at any time, *Vandergriff*, 759 F.3d at 395, but also, for as long as the plate remains associated with the vehicle it is the individual driver's choice that determines its longevity. Moreover, although the area for speech on a specialty license plate remains standard, there is virtually no limit to the variety of expression it may contain so long as basic statutory requirements are met.

Third, in the particular forum created by Texas, the purpose of the custom license plates is demonstrably not to convey, sponsor, or promulgate a certain government message, as was the intent in both *Summum* and *Johanns*. *See Summum*, 555 U.S. at 471-72 (monuments chosen to portray a particular public "view" and "message" of the city based upon "esthetics, history and local culture"); *Johanns*, 544 U.S. at 560-61 (specific government message on beef products). In contrast, any nonprofit organization is invited to obtain a specialty license plate in Texas—that is, until the message is deemed too unpopular by the government.

Fourth, the customized license plate messages are not chosen through a highly "selective[e]" legislative process involving editorial control, design input, requested modifications, or established content-based criteria to authorize a specific customized message. *Summum*, 555 U.S. at 471-72. Indeed, the customized license plate messages and symbols at issue here are not set "from beginning to end" by the government, are not selected, crafted, designed, or "effectively controlled" by the government, do not represent a

purposeful "overarching message" and value judgment made by the government, and are not edited and rewritten by the government. *Johanns*, 544 U.S. at 560-61. To the contrary, the custom plate is the brainchild of the sponsoring organization applicant. The design and cost of the plate are paid by the private organization, not the government. Indeed, private individuals and organizations take the initiative and choose to spend additional money to obtain a plate displaying a particular message on their privately-owned vehicles. *See Roach*, 560 F.3d at 868; *Stanton*, 515 F.3d at 967.

But for administrative approval of a plate upon completion of a few content-neutral, established guidelines (*e.g.*, nonprofit status and a refundable deposit upon sale of a certain number of plates), Texas is not substantively involved in this process at all. Yet Texas seeks to transform its administrative "approval" into sponsorship and adoption of all messages on all specialty license plates as government speech. Pet. Br. at 14, 23, 34. Yet this "approval" is necessary only to ensure that each plate possesses a unique registration number for identification purposes. Unlike the government speech in *Summum* and *Johanns*, Texas had no active hand in selecting, designing, crafting or editorializing "from beginning to end" the chosen message. "Approval" here is nothing more than a run-of-the-mill licensing or permitting scheme.

When government involvement is strictly clerical, it does not transform private views or expression into governmental endorsement of the message, let alone government speech. *See, e.g.*,

Bd. of Educ. of the Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 250 (1990) (that the government "do[es] not endorse everything they fail to censor is not complicated") (plurality opinion); *see also Widmar v. Vincent*, 454 U.S. 263, 273-74 (1981) (creation of forum "does not confer any imprimatur of state approval"). To allow purely administerial involvement to transform private speech to government speech would eviscerate private speech fora altogether.

C. License plates created through legislative enactment are immune from First Amendment scrutiny as long as government does not force individuals to display them.

Not all customized license plates are invariably crafted in the same manner or for the same purpose. As such, there are instances—as in *Berger v. ACLU of North Carolina*, No. 14-35 (U.S. cert. petition pending)—where customized license plates represent government speech immune from First Amendment scrutiny as long as government is not compelling their purchase or display.

For example, North Carolina (similar to South Carolina and Tennessee before it) created state-sponsored license plates bearing the message "Choose Life" through legislative enactment. *See ACLU of North Carolina v. Tata*, 742 F.3d 563, 566 (4th Cir. 2014) (legislature passed a law specifically authorizing the issuance of a "Choose Life" plate).[8]

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[8] *See Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786, 788 (4th Cir. 2004) ("Choose Life" license plate specifically approved by South Carolina legislature); *see also*

Texas has a similar legislative process—which is entirely separate from the forum at issue in this case—whereby the legislature can create and specifically authorize a custom plate. Tex. Transp. Code Ann. §§ 504.601-663. In fact, through that process, Texas adopted a "Choose Life" license plate. *See id.* § 504.662.

In all of these instances, the government entities, through a highly "selective[e]" process, chose to convey a "permanent" and particular message, *Summum*, 555 U.S. at 471-72, crafted and "effectively controlled" that message "from beginning to end," *Johanns*, 544 U.S. at 560, and communicated that "official" message in public by creating through legislative action state-sponsored plates, *Wooley*, 430 U.S. at 717. The fact that the North Carolina legislature "repeatedly rejected" license plates bearing pro-choice slogans (such as "Respect Choice") only further demonstrates a purposeful act by government to speak and advocate. *Tata*, 742 F.3d at 566. Therefore, legislatively-created license plates constitute government speech outside First Amendment scrutiny so long as no vehicle owner is being compelled to carry such speech on their own bumper. *See Wooley*, 430 U.S. at 715-17. The Fourth Circuit decisions to the contrary were thus wrongly decided.

Bredesen, 441 F.3d at 372, 376 ("The Tennessee legislature chose the 'Choose Life' plate's overarching message and approved every word to be disseminated.").

II. Texas engaged in unconstitutional viewpoint discrimination by refusing the Confederate flag plate in a forum created for private speech.

It is "axiomatic" that the government may not regulate private speech based upon "its substantive content or the message it conveys," *Rosenberger*, 515 U.S. at 828, and any regulation permitting such discrimination "cannot be tolerated" under the First Amendment. *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). "Discrimination against speech because of its message" is thus presumptively unconstitutional, *Rosenberger*, 515 U.S. at 828, and the government bears the burden of rebutting this presumed invalidity, *see U.S. v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000). Texas' denial of the Confederate flag plate is indefensible under this well-established analysis.

A. Texas may not exclude an unpopular viewpoint from a forum it created.

Texas elected to open an otherwise closed forum (the space adjacent to and below the registration numbers on state-issued license plates) for private expression. Few restrictions were implemented to limit access to this forum (*i.e.*, monetary deposit, plate commitments, and nonprofit status). Texas was under no constitutional obligation to open such a forum, but having done so, the First Amendment applies. *See Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("Once a forum is opened up" to speaking by some groups, government "may not grant the use of a forum to people whose views it finds acceptable, but deny

use to those wishing to express less favored or more controversial views.").

In both Texas and New York, the State invited nonprofits to promote their causes on specialty license plates for use on privately-owned vehicles. The government was agnostic as to their cause until a group promoting the Confederate flag in Texas and a pro-adoption group in New York tried to access the forum. But, having created a forum for private speech on customized license plates—even if under no obligation to do so in the first place—both States "assumed an obligation" to regulate speech "under applicable constitutional norms," *Widmar*, 454 U.S. at 267, and "respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829.

Regardless of the specific nature of the forum created for specialty license plates, speech "otherwise within the forum's limitations" may not be excluded based upon its viewpoint. *Id.* at 830.[9]

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[9] In a designated public forum, the government has "opened for use" property it owns as "a place for expressive activity," and speakers cannot be excluded nor content-based restrictions allowed without satisfying strict scrutiny. *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). By comparison, in a limited public forum or nonpublic forum, speech restrictions "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985). Denying access to a speaker "solely to suppress the point of view he espouses on an otherwise includible subject," violates the First Amendment even in a nonpublic forum. *Id.* (internal citations omitted); *see also Rosenberger*, 515 U.S. at 829 (government

"Viewpoint discrimination" is "an egregious form of content discrimination." *Id.* at 829. "Content discrimination" may be permissible if it "preserves the purpose" of a limited public forum, but the distinction between the two "is not a precise one." *Id.* at 830-31.

This Court's precedents "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad.*, 512 U.S. at 642. Content-based restrictions on private speech allow government officials to "effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). But "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Against this backdrop of First Amendment law, Texas impermissibly targeted an unpopular viewpoint for exclusion—a textbook example of unconstitutional speech discrimination. Texas was not barring the speech because it excluded plates honoring war veterans (in fact, approximately 80 different plates specifically honor members of the armed forces or veterans of different wars) or barred plates with flag logos (at least five plates

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must abstain from regulating speech when speaker's ideology, opinion, or perspective "is the rationale for the restriction").

include images of flags). In fact, as Texas previously conceded, and reaffirms to this Court, the reason the Confederate flag plate was denied is precisely because of the "idea" expressed on the plate—"specifically the confederate flag portion of the plate." Pet. Br. at 1-2, 25, 45. That the plate may be "offensive" to members of the public is reason for protecting the speech not precluding it. *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (that a speaker's viewpoint "gives offense" is a reason "for according it constitutional protection").

The government officials that denied CFF's "Choose Life" plate in New York admitted similar displeasure with the ideas and views they identified with CFF's specialty plate. Excluding CFF from speaking on women's health (*e.g.*, plates advocating breast cancer research and domestic violence prevention), children's welfare (*e.g.*, autism awareness and drug-free youth programs), and other issues that are "otherwise permissible" because CFF approaches them "from a [pro-adoption] standpoint" was classic viewpoint discrimination, as the district court found. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Neither New York nor Texas may "favor one speaker over another" or target "particular views taken by speakers on a subject." *Rosenberger*, 515 U.S. at 828-29.

It is imperative that this Court, in delineating the contours of forum analysis, keep in mind the risk that government may use its power "not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate." *Turner Broad.*, 512

U.S. at 641.[10] Yet there is "no more certain antithesis" to the Free Speech Clause than government's usage of private speech restrictions to produce "thoughts and statements" it deems "acceptable" to the public. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 579 (1995). Moreover, the "exclusion of several views" on a "topic of debate" is "just as offensive to the First Amendment as exclusion of only one." *Rosenberger*, 515 U.S. at 831-32 (rejecting the claim that "debate is not skewed so long as multiple voices are silenced," and holding instead that "the debate is skewed in multiple ways").[11]

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[10] Government officials rejecting CFF's specialty plate alleged an unwritten practice of insuring that plates "do not present or support" either side of controversial political, religious, or social issues. However, specialty plates bearing "Cop Shot" (featuring a blood splattered logo replete with the "o" in "Shot" pictured in a cross-hair and a tagline that reads "SUPPORT POLICE"), "Knights of Columbus" (a religious fraternal organization), "War on Terror" and "Vietnam War" (wars that are hotly debated), and "Union Yes" (featuring a checked ballot box and the name of a prominent labor union as the tagline), just to name a few, were available. This selective application of the alleged ban on controversial speech is constitutionally impermissible for it allows government to control the marketplace of ideas by "select[ing] the 'permissible subjects for public debate.'" *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (citation omitted).

[11] For example, if a State excludes "the entire subject of abortion" from specialty plates and authorizes "neither a pro-life plate nor a pro-choice plate," *White*, 547 F.3d at 855, there is a natural suspicion that this "no plates on the topic of abortion" rule is intended to stifle a particular viewpoint on that topic. This is especially apparent where that "rule" is a post hoc litigation position by the government. Such exclusions run afoul of this Court's precedent in *Rosenberger*

It is also important that the government's reasons for, and interests in, silencing certain speech are scrutinized appropriately. For example, wildly fantastical and factually vacant assertions by a government official that the presence of certain "emotionally charged" logos or taglines on license plates will "engender violent discourse among drivers" and cause "road rage and aggressive driving" are not enough. *See, e.g., CFF*, 829 F. Supp. 2d at 52-53. Such unsubstantiated claims, directed at CFF in New York, obviously ring hollow. *See Lamb's Chapel*, 508 U.S. at 395-96 (rejecting government's argument that denial or use of its property to a "radical" church prevented "threats of public unrest and even violence" because "[t]here is nothing in the record to support such a justification"). If the apparent violent outbreaks are imminent, then one would expect there to be evidence of such violence in States that have permitted comparable plates for years or, in this case, some action taken to curb Confederate-flag bumper stickers.

B. Texas' exclusion of the Confederate flag plate displays the danger in giving government officials unbridled discretion in regulating speech fora.

The First Amendment forbids States from granting government officials unbridled discretion to permit or disallow private speech, yet that is precisely what Texas did here. The danger of "content and viewpoint censorship" of private

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and constitute impermissible viewpoint discrimination under the First Amendment.

speech is "at its zenith" when the determination of "who may speak and who may not is left to the unbridled discretion of a government official." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763 (1988).

"[W]ithout standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *Id.* at 763-64. More troubling still, that choice caters to the bureaucratic predisposition to squelch contrarian speech. To avoid this risk, license or permitting schemes must contain "neutral criteria," *id.* at 760, and "narrow, objective, and definite standards" to guide government officials' exercise of authority, *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (citation and internal quotations omitted). Otherwise, their unconstrained discretion may become the means for "suppressing a particular point of view." *Id.* (citation and internal quotations omitted).

In Texas, the administrative specialty license plate scheme grants government officials unfettered discretion to exclude private speakers if a proposed plate "might be offensive to any member of the public." Tex. Transp. Code Ann. § 504.801(c). New York provides similar unfettered discretion, allowing government officials to exclude organizational speech if the custom plate is "patently offensive." 15 N.Y. Comp. Codes R. & Regs. § 16.5(e). Such malleable terms are the vehicles for bureaucratic whim and government censorship of unpopular viewpoints. Indeed, the

suppression of CFF's "particular point of view," *Forsyth*, 505 U.S. at 131, was evidenced by New York denying a plate bearing the message "Choose Life" but allowing a plate bearing the highly similar message "Donate Life."

Recognizing the inherent fallibility of such contentless provisions, this Court requires that speech restrictions be limited to objective categories long familiar to this Court, such as "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct," all of which are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *U.S. v. Stevens*, 559 U.S. 460, 468-69 (2010) (internal citations and quotations omitted).

A State may, of course, choose to allow only specialty plates created by legislative enactment and thus avoid First Amendment scrutiny so long as citizens are not compelled to carry a government message with which they disagree on their vehicles. Or a State may choose to create a forum that limits the "class of speakers" to nonprofit corporations organized in their state, educational institutions, sports teams, or other such legitimate "subject matter" limitations. States may also institute reasonable time, manner, and place restrictions. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011). In organizational license plate fora, such restrictions may include the size of letters and logos, the number of plate commitments, and the background color of the plate.

But, if a State purposefully chooses to open a forum for a smorgasbord of causes, groups, and organizations to speak (as both Texas and New York did), it must ensure that any speech restrictions in the forum are viewpoint-neutral. Texas plainly did not. It must also eliminate standards that fail to impose specific limitations on government officials' discretion in admitting speech to the forum. Again, Texas did not. Texas' failure to comply with these Constitutional norms after creating a forum for specialty plates abridged the Respondents' rights under the Free Speech Clause of the First Amendment.

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

JONATHAN D. CHRISTMAN
Counsel of Record
Fox Rothschild LLP
10 Sentry Parkway, Suite 200
P.O. Box 3001
Blue Bell, PA 19422
(610) 397-6500
JChristman@foxrothschild.com

RANDALL L. WENGER
Independence Law Center
23 North Front Street, Second Floor
Harrisburg, PA 17101
(717) 657-4990

Attorneys for *Amicus Curiae*
Dated: February 13, 2015